BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2021-88-E

IN RE: Dominion Energy South Carolina, Incorporated's 2021 Avoided Cost Proceeding Pursuant to S.C. Code Ann. Section 58-41-20(A)	**RESPONSE IN OPPOSITION TO INTERVENOR'S MOTION FOR COMMISSION TO REVIEW THE SUFFICIENCY OF DESC'S APPLICATION**

Dominion Energy South Carolina, Incorporated ("DESC" or "Company") submits this Response in Opposition to the Motion for Commission to Review the Sufficiency of DESC's Application ("Motion") filed by the South Carolina Department of Consumer Affairs ("Department"). The Department requests that the Public Service Commission of South Carolina ("Commission") "review the sufficiency" of the Application filed by the Company on April 22, 2021, pursuant to Order No. 2021-166. The Motion must be denied because the Application has been accepted for filing; there is no statutory or regulatory authorization or directive supporting the Motion; the Department and all other interested parties will receive the standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and all other appropriate terms and conditions ("Avoided Cost Items") in accordance with the statute and Order No. 2021-166; and neither the Department nor any other party will be prejudiced by the denial of the Department's Motion. For the reasons that follow, the Department's motion is flawed and must be denied.

Background

DESC is a participant in the Renewable Energy Program authorized by S.C. Code Ann. §§ 58-41-05 *et. seq.* ("Avoided Cost Statute"). On March 21, 2021, the Commission initiated this proceeding through Order No. 2021-166, requiring DESC to submit an application requesting that the Commission initiate the first 24-month review it is mandated to conduct pursuant to S.C. Code Ann. § 58-41-20(A) ("Avoided Cost Review"). The Company submitted its Application on April 22, 2021, requesting that the Commission review the Avoided Cost Items pursuant to the Avoided Cost Statute. The Department challenges the Application filed by the Company on the basis that the Application lacks sufficient information.

Analysis and Argument

A. Because the Commission has already accepted the Application for filing and, thus, determined that the Application complies with its rules and regulations, the Motion is untimely and moot.

Simply put, the Department's Motion should be rejected because the Commission has accepted the Application and, thus, determined that it complies with the governing rules and regulations. An application is a pleading. S.C. Code Regs. 103-804(O). The regulations provide that the "Chief Clerk may refuse to accept for filing any pleading which does not conform to the rules of the Commission." *Id.* 103-817(B)(2). But if the Chief Clerk accepts the pleading, she must "give the Commission notice of such filing at the next regular meeting of the Commission." *Id.* 103-17(C)(2). Then, ***"[a]fter any pleading has been accepted for filing***, the Chief Clerk may … provide the party filing the pleading a Notice of Filing …." *Id*. 103-817(C)(3) (emphasis added). Thus, if the Commission is

notified that a pleading has been filed, the pleading is not rejected by the Chief Clerk or the Commission, and a Notice of Hearing is issued by the Chief Clerk, the pleading has necessarily been accepted by the Commission under its rules and regulations.

Viewed in this light, the Application has been accepted for filing and, thus, complies with the governing rules and regulations. The Chief Clerk did not "refuse to accept for filing" the Application when it was submitted on April 22, 2021, and on April 28, 2021, notified the Commission of that filing as required by Regulation 103-817(C)(2). *See* Ex. A, at 7, Item 25. The Commission did not reject the filing or otherwise act negatively with respect to the Application, and, on April 30, 2021, the Chief Clerk provided the Company with a "Notice of Filing and Hearing and Prefile Testimony Deadlines." Ex. B. Because the Notice of Filing is provided to a party only "[a]fter any pleading has been accepted for filing," S.C. Code Regs. 103-817(C)(3), the Commission has necessarily accepted the Application for filing and, thus, determined that the Application complies with its rules and regulations. That determination renders moot the Department's Motion to label the Application as deficient. *See, e.g., Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court."). The Department's Motion should be denied and dismissed.

B. The Company was not required to file the Avoided Cost Items with the Application.

1. *There is no statutory requirement that the Company file the Avoided Cost Items with its Application.*

By its plain language, the Avoided Cost Statute contemplates that the Commission will initiate the mandated review. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007) ("The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation."). Rather than requiring an application, the Avoided Cost Statute directs that the Commission:

> **shall open a docket** for the purpose of establishing each electrical utility's [Avoided Cost Items]. Within six months after the effective date of this chapter, and at least once every twenty-four months thereafter, the [C]ommission **shall approve** each electrical utility's [Avoided Cost Items].

S.C. Code Ann. § 58-41-20(A) (emphasis added). Thus, the plain language of the statute requires that the Commission open the review process and, at least once every 24 months following the initial establishment, that "the [C]ommission shall approve" each electrical utility's Avoided Cost Items. S.C. Code Ann. § 58-41-20. The statute says nothing about an Application and, thus, does not contain any requirements regarding the contents of or attachments to any Application. And a review of Order No. 2021-166 demonstrates that the Commission did not independently impose any requirements beyond the filing of an Application. Rather, it simply established a timeline for this matter.

The Legislature has only directed the Commission to "open a docket" in two instances, both in the same legislative act, but did not require the filing of an application in

either instance. Act No. 62 of 2019 ("Act No. 62"). Act No. 62 "made significant changes to the procedures related to avoided costs and utility purchases of power under PURPA and the issues to be considered by the Commission in this docket." Order No. 2019-847, issued in Docket No. 2019-184-E. The goal of Act No. 62 is to ensure that QFs [qualifying facilities] are properly paid for the electricity they produce in accordance with the costs avoided by utilities while also making sure that excess costs are not shifted to or borne by utility customers. *Id*. The Legislature used the term "open a docket" twice in Act No. 62: once in regard to establishing and reviewing an electric utility's Avoided Costs Items and a second time to authorize reviews of an electric utility's community solar program. S.C. Code Ann. §§ 58-41-20, -40.[1] Neither of these statutes mandates an application or imposes any filing requirements with respect to an application and, thus, there is no basis for inferring the requirements that the Department seeks to impose here.

In point of fact, this proceeding is substantially and procedurally akin to the annual fuel cost review proceeding mandated by S.C. Code Ann. 58-27-865 ("Fuel Cost Review").[2] Like the Avoided Cost Statute, the statute mandating Fuel Cost Reviews mandates periodic reviews but does not require an application. S.C. Code Ann. § 58-27-865. Consistent with that interpretation, rather than require an application, the

[1] S.C. Code Ann. § 58-41-40 provides:

> [w]ithin sixty days after the effective date of this chapter, the [C]ommission shall open a docket for each electrical utility to review the community solar programs established pursuant to Act 236 of 2014 and to solicit status information on existing programs from the electrical utilities.

[2] Notably, prior to the passage of Act No. 62, the Fuel Cost and Avoided Cost reviews were conducted simultaneously.

Commission annually opens a review docket for each electric utility. The utilities then develop the requested schedules and information and provide those along with the filing of their direct testimony and provide supporting information through the process. It would be substantively and procedurally irregular and inconsistent to require the Company to submit the Avoided Cost Items along with an application in this matter whereas there is no such requirement for the Fuel Cost Statute.

Thus, the Avoided Cost and Fuel Cost Statutes differ from other statutes within Chapter 58 where the legislature has statutorily required an application with the Commission. As an example, the South Carolina Distributed Resource Act, S.C. Code Ann. § 58-39-110 *et seq.*, which authorizes the Distributed Energy Resource Program, specifically provides that an electric utility "may" file for Commission approval prior to participation in the program. Similarly, the Lease of Renewable Electric Generation Facilities Program, S.C. Code Ann. § 58-27-2620 *et seq.*, specifically requires that "[b]efore any entity other than an entity lawfully providing retail electric service to the public in this State commences to do business as a lessor of renewable electric generation facilities under the terms of this article, that entity **shall submit an application** to the Office of Regulatory Staff." S.C. Code Ann. § 58-27-2620 (emphasis added). And, of course, it is incumbent on the Company to file an application when it believes rate relief is appropriate. But here, there is no statutory requirement regarding the filing of an application or its contents because by statute it is the Commission and not the utility that initiates the review process for avoided costs. Thus, the statute does not support the

Department's argument that the Company should have filed the Avoided Cost Items with the Application, and the Order of course does not otherwise impose any such requirement.

2. *The Department's Motion is not supported by the Commission's rules and regulations*.

The Motion also is not supported by the pertinent rules and regulations. As noted above, the Commission has determined that the Application complies with its rules and regulations by accepting it for filing. But above and beyond that determination, the information an applicant must provide in support of a proposal before the Commission must, absent a governing statute, be set forth by regulation. *Utilities Servs. of S.C., Inc. v. S.C. Off. of Regul. Staff*, 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011). More to the point, an application submitted to the Commission is required only to set forth a "concise and cogent" statement of the facts, and certainly need not set forth the entire record. S.C. Code. Regs. 103-819, 103-823. And, contrary to the Department's contention, the Application does "clearly and concisely" explain the "specific relief sought" by the Company and the plan for proceeding in compliance with Order No. 2021-166.

While the Commission has used its statutory authority to promulgate regulations such that certain documents must be provided along with applications in "general rate establishment and adjustment" matters, nowhere in the regulations has the Commission indicated that these documents must be appended to all applications.[3] Nor has it applied

[3] Based on the nature of this proceeding and the scheduling framework, the Company certainly has not, contrary to the Department's suggestion, had "months or even years to prepare [its] application[ ] for filing." Mot. at 4.

those application requirements to Avoided Cost Reviews. In fact, as S.C. Code Ann. § 58-33-240 states:

> [t]he requirements related to the form and content of applications in general rate proceedings, however, only shall apply to proceedings or combined proceedings which include an application for new electric rates under Section 58-27-860 and only shall apply to that part of the application or combined application which is filed under Section 58-27-860.

S.C. Code Ann. § 58-33-240. Where the Commission seeks additional information beyond that which the statute and regulations explicitly require, it must give an applicant an appropriate opportunity to gather data in response. *Utilities Servs.*, 392 S.C. at 109, 708 S.E.2d at 762. Order No. 2021-166 expressly sets forth the parameters of the Company's opportunity to develop the Avoided Cost Items, and DESC is in the process of developing the Avoided Cost Items in accordance with the schedule set forth in Order No. 2021-166.

Because the Avoided Cost Statute does not authorize the Commission to require an electric utility to apply for an Avoided Cost Review, there is no authority for the Department to seek review of the sufficiency of an application apart from the final determination in the matter, which is only made after notice and an opportunity to be heard.[4] There are no Commission rules or regulations specifically applicable to Avoided

[4] There is no statute, rule, or regulation that provides for a review of the sufficiency of the Company's application. The Commission's hearing procedures do not provide for a party to file what is essentially a motion for a more definite statement. Article 8 of Chapter 103 of the Code of Regulations fixes the standards to govern the practice and procedures of parties before the Commission. S.C. Code Regs. 103-800. Nothing in Article 8 gives a party the right to seek a more definitive statement in the absence of any statutory requirement regarding the filing of the Application. As discussed, *supra*, the Avoided Cost Statute does not contain a legislative authorization for the Commission to require an electric utility to file an application to initiate an Avoided Cost Review.

Cost Reviews. Nor is there precedent to be found in prior matters aside from the Fuel Cost Reviews, in which the Commission has not required the filing of an application to initiate the review proceeding. Just as Plaintiffs in civil action cannot seek a more definite statement because not all relevant documents are not attached to the complaint, the Department is not entitled to a more definite statement merely because the Avoided Cost Items are not yet completed. Therefore, the Motion is improper and should be rejected.

C. Because the Department does not need the Company's information to develop its own case-in-chief, the Department will not be prejudiced through denial of the Motion, whereas granting the Motion will prejudice the Company.

The Department cannot credibly complain to be prejudiced by application of the framework contemplated by the Avoided Cost Statute and implemented by Order No. 2021-166. As noted above, the Avoided Cost Statute explicitly states which procedures must be adhered to in an Avoided Cost Review. *See* S.C. Code Ann. § 58-41-20(A)(2). Pursuant to Order 2021-166, the Department has until July 13, 2021, to file its own Direct Testimony in this matter. The Department has the ability right now to develop its own proposals for the Avoided Cost Items; *i.e*., the standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any other appropriate terms and conditions that it may conclude warrant consideration. The Department does not have to wait on the Company's presentation of these items before developing its own recommendations as part of its case-in-chief. Based on its challenge to the Application, the Department really seeks to use its direct testimony as rebuttal testimony. But aside from the fact that the Department can develop its own case-in-chief right now, Order No. 2021-166 gives the Department two weeks during which it can

develop and incorporate responses to the Company's direct testimony and submissions in addition to filing its own proposals.

What the Department seeks to do is abbreviate the time period in which the Company can develop the pertinent documents in a docket initiated by the Commission, while extending the Department's time for developing its own recommendation and challenging the Company's submissions. The Company presently is preparing the Avoided Cost Items for submission in accordance with Order No. 2021-166. Although that process is underway, it is not complete, and the Avoided Cost Items require additional work and development before they will be ready for review by this Commission. To require the Company to abbreviate that process just to meet the preferred schedule of the Department would be prejudicial to the Company and would ultimately work to the disadvantage of the parties and this Commission by forcing the early production of documents. *See McIntyre v. Sec. Comm'r of S.C.*, 425 S.C. 439, 450, 823 S.E.2d 193, 198–99 (Ct. App. 2018) (holding that an administrative agency need not adhere to strict rules of evidence [or civil procedure] when acting in a judicial capacity, but that "the substantial rights of the party must be preserved") (quoting *City of Spartanburg v. Parris*, 251 S.C. 187, 190, 161 S.E.2d 228, 229 (1968)). Because, as noted above, the information required in an application must be set forth by regulation, *Utilities Servs.*, 392 S.C. at 109, 708 S.E.2d at 762, and because the Application was accepted for filing, DESC had no notice that the Commission intended to require DESC to append the Avoided Cost Items to the Application it required DESC to file in the proceeding it was required to initiate. To do so now would be procedurally and substantively unfair.

The Department's argument that the alleged deficiencies in DESC's Application will prejudice the independent third-party investigator also is inconsistent with the nature of this Proceeding. The Department argues that the independent investigator will not have sufficient time to review the necessary information unless DESC files these documents at the outset of the Proceeding. But the third-party investigator currently is not scheduled to be appointed until June 9, 2021. Order No. 2021-319. The third-party investigator will have sufficient time to review the documents in accordance with the contemplated schedule. For the same reasons discussed above, neither the Department nor the third-party investigator have been or will be prejudiced by DESC's failure to append the Avoided Cost Items to the Application. DESC's Application therefore is not deficient as a matter of law and does not work to any party's prejudice.

For all these reasons, the Department is not entitled to the relief it seeks because to do so works to the prejudice of DESC's ability to fully develop and submit the Avoided Cost Items for review and approval. The Department seeks to expand its own review period at the expense of the Company's time for developing the appropriate submissions and does so by attacking an Application that comports with the Avoided Cost Statute and that already has been accepted as complying with the Commission's rules and regulations. The Department's motion should be rejected.

Conclusion

For all the reasons set forth above, the Department's Motion must be denied.

Respectfully submitted,

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